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STATE OF INDIANA)	IN THE ELKHART SUPERIOR COURT 2
) SS:	
ELKHART COUNTY)	CAUSE NO 20D02-1106-PL-37
LEO VANNORMAN, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	
)	
FLEXSTEEL INDUSTRIES, INC., LDL REALTY)	
COMPANY, LLC., HERITAGE FINANCIAL GROUP,)	
INC., DAVID DYGERT AND PHYLLIS B. DYGERT)	
)	
Defendants.)	
)	

**BRIEF IN SUPPORT OF DEFENDANT FLEXSTEEL'S
MOTION FOR SUMMARY JUDGMENT**

Based on unsupported allegations pled "on information and belief," Plaintiffs' *Amended Complaint* creates a false tale of chemical usage and releases at the former Dygert Seating Division of Flexsteel Industries, Inc. ("Flexsteel"), which Plaintiffs speculate led to trichloroethylene ("TCE") and small amounts of trichlorethane ("TCA") in the groundwater underneath their current or former residences. These allegations are not true – and Plaintiffs knew or should have known that these allegations are not true because of the participation of their counsel's law firm in the events underlying Plaintiffs' *Amended Complaint*.

The former Dygert Seating Division of Flexsteel did not use adhesives or other products that contained TCE or TCA in its manufacturing processes. Nor did Flexsteel dispose of TCE or TCA from its Elkhart, Indiana manufacturing sites under the EPA Identification number for 1010 Eisenhower Drive in Goshen, Indiana, as alleged by Plaintiffs. These allegations are false, and lack any admissible evidence to support them.

Flexsteel is entitled to summary judgment on Plaintiffs' frivolous claims because Plaintiffs' unsupported and false theories of chemical usage and disposal have no basis in fact.

I. STATEMENT OF MATERIAL FACTS

It is undisputed that this case arises from the August, 2007 discovery of a plume of TCE and small amounts of TCA in the groundwater underneath the Plaintiffs' current or former residences in Elkhart, Indiana. This plume of contaminants was deemed the "Lane Street Groundwater Contamination Site" by the Indiana Department of Environmental Management ("IDEM") and United States Environmental Protection Agency ("EPA"). (*See EPA April 2011 Newsletter, attached here to as Flexsteel Exhibit ["FE"] 1*).

The EPA exercised jurisdiction over the Lane Street Groundwater Contamination Site, placing the Site on EPA's National Priorities List (*i.e.*, "Superfund") in 2009. (*FE 1* at p. 1). Pursuant to their authority, EPA and the Indiana Department of Environmental Management ("IDEM") have been investigating the potential source(s) of the plume and will be responsible for fashioning an appropriate remedy. (*Id.*) But "the source of the pollution has not yet been identified." (*Id.*)

Nonetheless, Plaintiffs filed this lawsuit in March 2011, asserting "on information and belief" that the contamination came from the former manufacturing sites once owned or operated by defendants, where Flexsteel briefly operated between March, 1997 and January 2002. In their lawsuit, Plaintiffs seek to hold Flexsteel, as well as certain other financially *solvent* companies once associated with defendant David Dygert, liable for the contamination.

In their *Amended Complaint*, Plaintiffs ask the Court to award damages from Flexsteel for alleged physical and emotional injuries of which Plaintiffs have been aware since 2007, as well as attorney fees spent in pursuit of these claims under the Environmental Legal Action statute ("ELA"), Ind. Code. § 13-30-9-2 *et seq.* But Plaintiffs' claims have no basis in fact, and Plaintiffs know them to have no basis in fact. Flexsteel is entitled to summary judgment here.

A. DYGERT SEATING, INC.

Beginning in approximately 1985, Dygert Seating, Inc. began manufacturing recreational vehicle seating out of a building constructed by Dave Dygert at 53381 Marina Drive in Elkhart, Indiana. (*Affid. of David Dygert*, at ¶ 3, *attached hereto as FE 2*). Dygert Seating, Inc. was essentially an assembly and “cut and sew” operation. (*Id.* at ¶ 4). Namely, Dygert Seating, Inc. purchased metal frames and foam that was pre-formed in the shape of recreational vehicle seat backs and bottoms from vendors. Dygert Seating, Inc. assembled the frames and foam to create an uncovered seat, and then covered the assembled seat in fabric that had been cut and sewn at Dygert Seating, Inc. to create a finished recreational vehicle seat. (*Id.*)

In November 1988, Dave Dygert purchased a pre-existing manufacturing site at 23542 Cooper Drive, in Elkhart Indiana. (*Id.* at ¶ 5). The Cooper Drive site was adjacent to the Marina Drive manufacturing site. (*Id.*). Thereafter, Dygert Seating, Inc. manufactured its own vehicle seating frames out of the Cooper Drive manufacturing site, which was called the “Steel Division.” (*Id.* at ¶6). The assembly process remained the same at the Marina Drive manufacturing site, except that the frames for Dygert Seating, Inc. vehicle seating now came from the “Steel Division” on Cooper Drive. (*Id.* at ¶ 7).

In 1995, Dygert Seating, Inc. purchased the assets of another vehicle seating company, called Goshen Cushion, Inc. (*Id.* at ¶8). Goshen Cushion, Inc. previously operated at 1010 Eisenhower Drive in Goshen, Indiana. (*Id.*). After purchasing the assets of Goshen Cushion, Inc., Dygert Seating, Inc. leased the manufacturing site at 1010 Eisenhower Drive from Innkeepers of Goshen, who owned the facilities and property in Goshen, Indiana. (*Id.* at ¶ 9).

Innkeepers of Goshen was a client of the law firm Yoder, Ainlay, Ulmer, and Buckingham (“YAUB”). This law firm also represents Plaintiffs here.

Dygert Seating, Inc. briefly operated both in Goshen and in Elkhart until approximately

December 1, 1996, when Dygert Seating, Inc. closed its Goshen location. (*FE 2* at ¶10). Two months later, on January 30, 1997, Dygert Seating, Inc. filed for bankruptcy. (*Id.* at ¶11; *See also* docket for *In re Dygert Seating Inc.*, 97-30265, attached as *FE 3*).

B. FLEXSTEEL PURCHASES, AND THEN SELLS, SELECTED ASSETS OF DYGERT SEATING, INC.

By a March 3, 1997 Order of the bankruptcy court, Flexsteel purchased selected assets of the bankrupt entity Dygert Seating, Inc. on March 18, 1997 (*Affid. of Carl Breen*, at ¶ 3, attached hereto as *FE 4*). Flexsteel used these assets to create the Dygert Seating Division of Flexsteel, which operated at the Marina Drive and Cooper Drive manufacturing sites in Elkhart, Indiana in a similar fashion as Dygert Seating, Inc. had operated at those locations in 1996. (*FE 2* at ¶ 14; *FE 4* at ¶ 5). Flexsteel did not purchase any of the Goshen assets of the bankrupt entity, Dygert Seating, Inc., except some equipment and upholstery materials. (*FE 4*, at ¶ 4).

The Dygert Seating Division of Flexsteel operated at both the Marina Drive and the Cooper Drive manufacturing sites in Elkhart, Indiana from March 1997 until approximately December 2000, when Flexsteel closed the “Steel Division” at Cooper Drive. (*FE 2* at ¶20; *FE 4*, at ¶ 6). Thereafter, the Dygert Seating Division operated only at the Marina Drive site until Flexsteel sold all of the assets of the Dygert Seating Division to a new company formed by Dave Dygert, called PBD Corporation, on January 2, 2002. (*FE 2* ¶¶ 20, 23; *FE 4* ¶ 7).

In short, Flexsteel operated the Dygert Seating Division for less than five years, from March 18, 1997 to January 2, 2002. (*FE 4* at ¶¶ 5-7).

C. THE DYGERT SEATING DIVISION OF FLEXSTEEL NEVER USED TCE OR TCA IN ITS MANUFACTURING PROCESSES.

The former Dygert Seating Division of Flexsteel was essentially an assembly operation. (*FE 2*, at ¶3). The manufacturing processes at this Division did not require large quantities of chemicals, nor were large quantities of chemicals stored at either the Marina Drive or Cooper

Drive manufacturing sites. (*Id.* at ¶¶4, 15, 16; *Affid. of J. Alexander*, ¶ 5, attached hereto as FE 5). Despite the minimal amounts of chemicals used at these manufacturing sites – which is readily apparent from public records – Plaintiffs allege “on information and belief” that the Dygert Seating Division “used and stored and disposed of . . . massive amounts of TCE, TCA, [and perchloroethylene (“PERC”)] . . . in connection with their manufacturing operations.”¹ (*Amended Complaint* ¶ 249).

Plaintiffs’ unsupported allegations are based on two theories, both of which are false, and which Plaintiffs knew or should have known to be false: (1) that Dygert Seating, Inc. and/or the Dygert Seating Division of Flexsteel purchased “massive amounts” of TCE and TCA, or products containing these chemicals, for use in its manufacturing processes; and (2) that Dygert Seating, Inc. and/or the Dygert Seating Division of Flexsteel secretly disposed of TCE and TCA, or products containing these chemicals, at the Marina Drive and Cooper Drive manufacturing sites in Elkhart, Indiana using the EPA Identification Number from a manufacturing site at 1010 Eisenhower Drive in Goshen, Indiana once operated by Dygert Seating, Inc. (and never owned or operated by Flexsteel). Plaintiffs also speculate that, somehow in the course of the undisclosed use and disposal of TCE and TCA, the Dygert Seating Division of Flexsteel “leaked, spilled, or dumped” TCE and TCA into the ground. (*Amended Complaint*, at ¶72).

None of these speculative theories, which Plaintiffs have pled “on information and belief,” is true.

1. The Adhesive Used by the Dygert Seating Division of Flexsteel Did Not Contain TCE or TCA.

The former Dygert Seating Division of Flexsteel was not a chemical-intensive operation.

¹ No Plaintiff is alleging exposure to PERC, and no PERC has been detected in the groundwater underneath their current or former residences.

The only chemical-containing product that was purchased in “bulk” for use in the manufacturing processes at the Marina Drive site, were a few 55 gallon drums of adhesive, which was used to glue a limited section of some vehicle seats. (*FE 2*, at ¶ 17; *FE 5*, at ¶¶ 5-6). The former Dygert Seating Division of Flexsteel used approximately one 55-gallon drum of adhesive a month in its operations. (*FE 2*, at ¶ 17; *FE 5*, at ¶ 8).

At any given time, the Marina Drive manufacturing site had approximately two 55-gallon drums of adhesive on hand – one drum of adhesive in use, and one drum waiting to be used. (*FE 5*, at ¶7). In addition, an empty drum or two that once contained adhesive may have been staged for collection by the supplier inside the building at Marina Drive from time to time. (*Id.*; *FE 2*, at ¶ 17). Full and empty drums of adhesive were stored inside the building at the Marina Drive manufacturing site. (*FE 2*, at ¶18; *FE 5*, at ¶10).

At least by 1994 – three years before Flexsteel purchased selected assets of the bankrupt entity Dygert Seating, Inc., – Dygert Seating, Inc. was using Premium Adhesive 30141-NFT in its manufacturing processes. (*Affid. of Tris Gour, attached as FE 6*, at ¶¶ 4-5, and § 6 of Exhibits A & Exhibit B thereto; *FE 5*, at ¶6). Dygert Seating, Inc. purchased this adhesive from Chem-Tech, an Elkhart, Indiana supplier, or sometimes from Vahala Foam. (*FE 5*, at ¶6; *FE 2*, at ¶19). Premium Adhesive 30141-NFT did not contain either TCE or TCA. (*FE 7*, at RFA No. 9; *FE 8* at Rog. No. 27).

The former Dygert Seating Division of Flexsteel, which began operation in March 1997, also used Premium Adhesive in its manufacturing processes through 2001. (*FE 5*, at ¶6; *FE 7*, at RFA No. 9; *FE 8* at Rog. No. 27). The Premium Adhesive used by this Division included formulations 30141-NFT and 30141-MS, which also did not contain either TCE or TCA. (*FE 7*, at RFA No. 9; *FE 8* at Rog. No. 27). In addition, the former Dygert Seating Division of

Flexsteel may have used formulation #7777, which did not contain TCE or TCA, either. (*Id.*).

In 2001, Flexsteel introduced a two-part, water-based adhesive into the manufacturing processes at the Marina Drive site. (*Id.*). This adhesive was called Fastbond Contact Adhesive 2000-NF with Spray Activator. (*Id.*). It did not contain either TCE or TCA. (*Id.*).

As stated above, Flexsteel sold the assets of its Dygert Seating Division on January 2, 2002, at which time it no longer manufactured any products in Elkhart. (*FE 3*, at ¶ 7). No spills of adhesives containing TCE or TCA – chemicals which were *never even used* in the manufacturing processes at the Dygert Seating Division of Flexsteel – occurred at that Division between March 1997 and January 2002. (*FE 7* at RFA 4 & 7; *FE 8* at Rogs. No. 10, 25 -27)

2. Plaintiffs Are Asking The Court to Ignore Public Records that Demonstrate Plaintiffs Claims Regarding Adhesive Usage are False.

At the time Plaintiffs filed their *Amended Complaint*, Plaintiffs had access to publicly available records from the Elkhart County Health Department (“ECHD”), which included chemical usage observations at the Marina Drive and Cooper Drive manufacturing sites by ECHD inspectors, as well as other chemical usage reports made by the former Dygert Seating Division of Flexsteel. These records state that as of June 2, 1995, the Marina Drive manufacturing site had two 55-gallon drums of “Premium Adhesive (methylene chloride.” [sic]. (ECHD records, excerpted for the years 1995-2001, at *FE 9*). These records also state that the Marina Drive manufacturing site used adhesive and methylene chloride in both 1999 and 2001 – the last year Flexsteel owned its former Dygert Seating Division. (*Id.*)

Despite the contents of these public records, which are even cited in Plaintiffs’ *Amended Complaint* at ¶¶ 212-216 – and which explicitly state that Premium Adhesive contained methylene chloride – Plaintiffs pled, “on information and belief” that Premium Adhesive contained TCE. (*Amended Complaint*, at ¶ 240).

3. Other Chemical Usage at the former Dygert Seating Division of Flexsteel

Plaintiffs also allege, “on information and belief” that “solvents and degreasers such as TCE and/or [PERC] were used” at the former Dygert Seating Division of Flexsteel. (*Amended Complaint*, at ¶ 224). This statement is false. The former Dygert Seating Division of Flexsteel never stored or used PERC, TCE, or TCA, or products containing significant amounts of these chemicals, in conjunction with its manufacturing processes. (*FE 7* at RFA Nos. 9, 10; *FE 8* at Rogs. No. 25, 26, 27; *FE 5*, at ¶ 12).

Prior to the closure of the Cooper Drive manufacturing site in 2000, the Steel Division had welding gas and occasionally hydraulic oil or mineral oil stored at that site. (ECHD records, excerpted for the years 1996 through 1999, at **Exhibit 10**). There was no parts cleaner or degreasing machine used at the Cooper Drive site. (*FE 2*, at ¶ 22; *FE 5*, at ¶ 11).

Similarly, other than adhesive, the chemicals stored at the Marina Drive manufacturing site were products like oil for the sewing machines, small containers and aerosol spray cans of materials used in maintenance activities, or products purchased in sizes for individual or household use, such as aerosol spray cans of adhesive or aerosol spray cans of degreaser. (See *FE 7* at Rogs. 25-27; *FE 5*, at ¶ 11).

No TCE, TCA, or PERC was ever purchased in significant quantities, either in “pure” form or as part of a chemical formulation of some other material, by the former Dygert Seating Division of Flexsteel. (*FE 7* at RFA No. 9-10; *FE 8* at Rogs 25-27). And, that Division did not “leak, spill, or dump” products containing these chemicals into the soil or groundwater, either. (*FE 7* at RFA 4 & 7; *FE 8* at Rogs. No. 10, 25 -27)

4. Plaintiffs Are Asking This Court to Ignore Public Records that Demonstrate that Plaintiffs’ Claims of Chemical Usage at the Dygert Seating Division of Flexsteel are False.

At the time Plaintiffs filed their *Amended Complaint*, Plaintiffs had access to publicly

available records from the ECHD. These records state that as of June 2, 1995, an ECHD inspector identified only 5 gallons of pure methylene chloride and Parabond (a carpet/flooring product) at the Marina Drive manufacturing site, in addition to the methylene chloride-based Premium Adhesive identified above. (*FE 9*). These records also state that in both 1999 and 2001, the ECHD inspector identified only a few gallons of methylene chloride, adhesive, and hydraulic oil and/or paint – all of which were stored inside. (*Id.*).

The ECHD records further state that in 1996, shortly before Flexsteel purchased selected assets of the bankrupt entity Dygert Seating, Inc., an ECHD inspector identified only cutting oil and hydraulic oil at the Cooper Drive manufacturing site. (*FE 10*). In 1999, only mineral spirits and cutting oil were identified at that site (*Id.*).

The ECHD records also included Tier Two Emergency & Hazardous Chemical Inventory Forms for the Cooper Drive manufacturing site from 1997-2001, which only listed “rolled electric welded tubing” in reportable quantities at that site (*FE 11*).

Despite these publicly available records and reports – which did not identify PERC, TCE, or TCA at the former Dygert Seating Division of Flexsteel – Plaintiffs pled, “on information and belief” that this Division used “massive amounts” of these chemicals in its manufacturing processes. (*Amended Complaint*, at ¶ 249). Plaintiffs also pled, “on information and belief” that this Division “leaked, spilled, or dumped” TCE or TCA. (*Id.* at ¶ 72). These allegations, as stated above, are false.

D. PLAINTIFFS’ ALLEGATIONS THAT THE DYGERT SEATING DIVISION OF FLEXSTEEL MOVED AND USED TCE AND/OR TCA FROM GOSHEN AT THE ELKHART, INDIANA MANUFACTURING SITES, ARE FALSE.

In addition to the false statements concerning chemical usage at the former Dygert Seating Division of Flexsteel, Paragraphs 91 through 141 of Plaintiffs’ *Amended Complaint* allege, “on information and belief,” that Flexsteel committed mail fraud, wire fraud, fraud on the

Indiana Department of Environmental Management (“IDEM”), fraud on the U.S. Environmental Protection Agency (“US EPA”), and obstruction of justice.

These inflammatory and unsupported allegations speculate that TCE and TCA were secretly transported from 1010 Eisenhower Drive in Goshen, Indiana up to Elkhart, Indiana, where these chemicals were then used in the manufacturing processes at Marina Drive and Cooper Drive in Elkhart. (*Amended Complaint* ¶ 50 (“David Dygert closed the Goshen Cushion facility . . . and moved . . . all of its hazardous chemicals, to the Site.”); ¶ 91 (“Upon information and belief, the hazardous chemicals that were being used by Goshen Cushion, including large amounts of adhesives containing TCE, were transported to the Marina Drive Property and/or the Cooper Drive Property and were thereafter used in the Dygert Seating Entities’ manufacturing Operations at the Site.”), *id.*, ¶¶ 91-141).

Plaintiffs further speculate that the former Dygert Seating Division of Flexsteel then secretly disposed of these chemicals from the Marina Drive and Cooper Drive manufacturing sites in Elkhart, under the EPA Identification Number for 1010 Eisenhower Drive in Goshen, to “cover up” the use of TCE and TCA in Elkhart -- an alleged use which was never identified by the ECHD in any of its almost yearly inspections. (*Id.* at § “L.” on page 30). Plaintiffs know these allegations are false.²

In reality, the following events occurred, in which attorneys from the law firm representing Plaintiffs here, participated:

² Even if Plaintiffs’ allegations of chemical disposal were true, which they very clearly are not, disposal by a company under the EPA Identification Number for a different facility still does not equal *disposal into the ground*. For this reason as well, there is a logical disconnect between Plaintiffs’ allegations of waste disposal and their allegations that the Dygert Seating Division of Flexsteel released TCE into the ground. Flexsteel is entitled to summary judgment.

1. The Law Firm Representing Plaintiffs Negotiated the Removal of the Waste Described in Plaintiffs' Amended Complaint.

In April 1997, Industrial Safety and Environmental Services ("ISES") Principal Senior Scientist Tris Gour accompanied D&B Environmental to the former manufacturing site of Dygert Seating, Inc. at 1010 Eisenhower Drive in Goshen. (*FE 6*, at ¶¶ 7-8). The purpose of this visit was to characterize waste materials left at that manufacturing site by Goshen Cushion, Inc., prior to its purchase by Dygert Seating, Inc. (*Id.*)

Gour assisted D&B Environmental in sampling waste at that location to ascertain the correct method of disposal of this waste. (*Id.*). And, he received laboratory results from D&B Environmental concerning this sampling. (*Id.* at ¶ 9). None of these sample results indicated the presence of TCE, TCA, or PERC in the substances sampled. (*Id.* at ¶ 9 and Exhibit C thereto).

On May 1, 1997, Gour wrote to Gregg Gaskill, in Gaskill's capacity as the former Vice President of Dygert Seating, Inc. (*FE 6* at ¶ 10). In this letter, Gour stated that "all waste on-site" at 1010 Eisenhower Drive:

will be treated as a 'one-time' generation and shipment of hazardous and special waste resultant from the closing of a manufacturing facility. We will file for a one time generation and shipment EPA identification number for Dygert Seating, Inc.

(*Id.* at ¶ 10 and Exhibit D thereto (emphasis added)). Gour further provided a detail of the waste that ISES would be removing from the 1010 Eisenhower Drive site in Goshen under the EPA identification number that ISES would obtain. (*Id.*). These drums included:

30	drums of methylene chloride adhesives
3	drums methyl ethyl ketone
15	drums paint sludge and solids
1	drum flammable adhesives
7	drums starch adhesives
1	drum soap granules
1	drum oil and solvent mixed
1	drum oil liquids and solids
5	drums waste water and solvent mixed

1 cubic yard box containing 1 and 5 gallon solvents,
adhesives, and remaining cans.

(*Id.*). Notably, the materials on this list did not include TCE, TCA, or PERC. (*Id.*).

At least one partner of Plaintiffs' attorney, John Ulmer, received a copy of Gour's May 1, 1997 letter, as more fully set forth below.

On May 29, 1997, attorney Gordon Lord wrote to David Dygert for Dygert Seating, Inc., the attorney for Dygert Seating, Inc., and Flexsteel's counsel regarding the removal of barrels, crates, and other materials at 1010 Eisenhower Drive in Goshen. (*Affid. of J. O'Connor*, attached as *FE 12*, at ¶4 and Exhibit A thereto) This property was owned by Innkeepers of Goshen, a client of the law firm Yoder, Ainlay, Ulmer, and Buckingham ("YAUB"), and had been leased by the bankrupt entity, Dygert Seating, Inc. (*FE 2* at ¶¶ 8-9).

Gordon Lord was – and still is – a partner of John Ulmer, the attorney in *this* case who represented that Plaintiffs had a good faith basis for the allegations of fraud and improper chemical disposal contained in Plaintiffs' *Amended Complaint* when he filed that pleading on April 15, 2011. *See* IND. TR. R. 11. In his letter, John Ulmer's partner requested that Dave Dygert remove the barrels and other waste materials from the Goshen site. (*FE 12*, at ¶4 and Exhibit A thereto).

On June 9, 1997, counsel for Flexsteel notified John Ulmer's partner, Gordon Lord, that "On behalf of Flexsteel we are advising you that we know of no agreement, written or oral, where Flexsteel agreed to have anything to do with the barrels. Therefore Flexsteel will not be removing any barrels from the premises." (*Id.* at ¶6 and Exhibit B thereto). Flexsteel's counsel further expressly notified John Ulmer's partner that "Flexsteel only bought from Dygert equipment and inventory. . . ." and did not purchase any chemicals. (*Id.*)

On June 30, 1997, David Dygert wrote to ISES on behalf of DS Sales, Inc., the "Debtor-

in-possession” regarding the removal of the barrels from 1010 Eisenhower Drive in Goshen, referenced by Gour in his May 1, 1997 letter and in the May 29, 1997 letter of John Ulmer’s partner, Gordon Lord (*FE 6*, at ¶¶ 11 and Exhibit E thereto). In his June 30, 1997 letter, Dave Dygert stated that the debtor-in-possession may not have enough money to remove the barrels as requested by John Ulmer’s partner. (*Id.*).

Thereafter, on July 2, 1997, Innkeepers of Goshen informed ISES that Innkeepers would pay for “the removal and safe and legal disposition of the hazardous and special waste situated at the Eisenhower Drive facility as set forth in your letter of May 1, 1997 to Gregg A Gaskill, Vice President, Dygert Seating (copy attached).” (*Id.* at ¶ 12 and Exhibit F thereto (emphasis added). John Ulmer’s partner, Gordon Lord, was copied on this letter, which enclosed Gour’s May 1, 1997 letter describing the waste to be removed from Goshen. (*Id.*)

On July 7, 1997, Innkeepers wrote a second letter to ISES, repeating their promise to pay for “the removal and safe and legal disposition of the hazardous and special waste situated at the Eisenhower Drive facility as set forth in your letter of May 1, 1997 to Gregg A Gaskill, Vice President, Dygert Seating (copy attached).” (*Id.* at ¶ 13 and Exhibit G thereto). Once again, John Ulmer’s partner, Gordon Lord, was copied on this letter. (*Id.*).

By fax dated July 16, 1997, ISES sent a draft Notification of Hazardous Waste for the removal of the waste from the old Dygert Seating, Inc. manufacturing site at 1010 Eisenhower Drive in Goshen to Gregg Gaskill for signature by Dave Dygert (*Id.* at ¶¶14-15 and Exhibit H thereto). Then, on July 17, 1997, ISES sent the draft Notification of Regulated Hazardous Waste Activity, with Dave Dygert’s signature, to IDEM. (*Id.* at ¶ 16 and Exhibit I thereto). As indicated by Gour in his May 1, 1997 letter, ISES requested an “EPA ID#” for the 1010 Eisenhower site, so that ISES could complete the Notification of Regulated Waste for the one-

time disposal of hazardous waste from this site. (*Id.*).

IDEM provided Dygert Seating, Inc. with an EPA Identification Number for the manufacturing site at 1010 Eisenhower Drive in Goshen: EPA ID# IND005253513. (*Id.* at ¶ 17). Then, on July 18, 1997, Tris Gour, acting as agent on behalf of the bankrupt entity, Dygert Seating, Inc., completed waste profiles for the waste to be manifested from 1010 Eisenhower Drive. (*Id.* at ¶ 18 and Exhibit K thereto).

The materials manifested from 1010 Eisenhower Drive in Goshen, which were the same materials described in the May 1, 1997 letter from ISES, did not contain TCE, TCA, or PERC. (*Id.*). In other words, the chemicals Plaintiffs incorrectly allege were moved from 1010 Eisenhower Drive in Goshen to the Dygert Seating Division manufacturing sites in Elkhart — where Plaintiffs allege the chemicals were secretly used, secretly disposed of, and secretly dumped into the ground, allegedly causing Plaintiffs harm in Elkhart thereafter — were *not even chemicals present in Goshen* to begin with.

Moreover, the waste from 1010 Eisenhower Drive was manifested under Uniform Hazardous Waste Manifest # INA 1170072. (*Id.*). A signed copy of this waste manifest, which demonstrates that the waste generated at 1010 Eisenhower Drive was in fact (1) picked up from the Goshen manufacturing site, and (2) properly disposed of in accordance with the law at Pollution Control Industries of Indiana, Inc., is publicly available to Plaintiffs from IDEM. (**Exhibit 13**).

On approximately July 23, 1997, ISES again submitted a Notification of Regulated Waste to IDEM, confirming the removal of the waste from Goshen just days earlier. (*FE 6*, at ¶ 17 & Exhibit J thereto). The July 23, 1997 Notification was virtually identical to the draft Notification initially submitted by ISES on July 17, 1997 — but this time contained the EPA Identification

Number for 1010 Eisenhower Drive in Goshen, Indiana obtained by ISES. (*Id.*).

In sum, no chemicals were transferred from 1010 Eisenhower Drive in Goshen to the manufacturing sites of Dygert Seating Division on Marina Drive or Cooper Drive in Elkhart. (*Id.* at ¶ 19) And the chemicals actually removed from Goshen – and taken to a proper disposal location – did not contain TCE, TCA or PERC. (*Id.* at ¶ 18 and Exhibit K thereto). The former Dygert Seating Division of Flexsteel did not release any TCE, TCA, or PERC into the ground, nor were those chemicals purchased or used by the Dygert Seating Division in the course of its manufacturing operations. (*FE 7* at RFA 4 & 7; *FE 8* at Rogs. No. 10, 25 -27)

But the involvement of John Ulmer's partners in the proper disposal of this waste continued after these disposal activities were completed.

After promising to pay ISES for removal of the waste at issue in Plaintiffs' *Amended Complaint*, YAUB's client, Innkeepers of Goshen, failed to pay ISES for this work. (*Id.* at ¶ 21). Thereafter, on September 9, 1997, another current partner of John Ulmer, Denise Davis, sent ISES an *Application for Payment of Administrative Expense* drafted by YAUB. (*Id.* at ¶ 21 and Exhibit L thereto). This *Application* affirmatively stated that "the undersigned removed hazardous and other waste materials from the Goshen manufacturing facility of Dygert Seating, Inc." (*Id.*). Upon receipt of this *Application* from YAUB, Gour completed it as instructed by John Ulmer's partner, and filed it with the Court on September 16, 1997. (*Id.* at ¶ 22 and Exhibit M thereto).

The file stamped copy of the *Application for Payment of Administrative Expenses*, which was drafted by YAUB attorneys and which attached ISES's invoice for the waste removal performed by ISES at the Goshen site owned by YAUB's client, was publicly available to Plaintiffs from the Bankruptcy Court at the time they filed their *Amended Complaint*.

2. Plaintiffs Ask This Court to Believe a Fictional Story of Waste Disposal Pled on “Information and Belief” that is Contrary to All Public Records and Contradicted by their Own Attorney’s Law Firm Correspondence.

Plaintiffs have no evidence that TCE or TCA was ever used in the manufacturing processes at the former Dygert Seating Division of Flexsteel. Indeed, this theory is contrary to all public record of chemical usage at those locations. Therefore, in order to plead their claims of TCE and TCA usage against Flexsteel, Plaintiffs must find a way to inject TCE and TCA into the manufacturing processes at the Marina Drive and Cooper Drive sites in Elkhart during the years 1997 to 2002, when Flexsteel operated at those sites.

Plaintiffs attempt to introduce TCE into the operations of the Dygert Seating Division of Flexsteel by layering misleading inferences and speculations, one on top of another. First, Plaintiffs point to an adhesive that allegedly contained TCE, which was used by Goshen Cushion, Inc. in 1987 (but Plaintiffs don’t disclose the date this adhesive was used). (*Compare Amended Complaint*, ¶ 88 with **FE 14**). Next, Plaintiffs imply that this adhesive was used at 1010 Eisenhower Drive in 1994 and 1996 by sandwiching an allegation that this 1987 adhesive contained TCE, between two allegations that cite ECHD records from 1994 and 1996 for 1010 Eisenhower Drive. (*Id.*, at ¶¶ 87-89). Plaintiffs further mischaracterize the 1996 records as a “follow up inspection,” misleadingly implying that the 1996 records somehow “follow up” on items identified by the ECHD in 1994 – which Plaintiffs previously implied to include the use of TCE. (*Id.* at ¶ 89). This is an improper inference, as the *actual* ECHD records cited – but not provided – by Plaintiffs demonstrate. (**FE 16**) In reality, these records relate to two independent, routine inspections by the Elkhart County Health Department – neither of which reference TCE. (*Id.*)

Then, Plaintiffs speculate that this allegedly TCE-based adhesive referenced in ¶ 88 of the *Amended Complaint*, subsequently was used by Dygert Seating, Inc. in Goshen after that

company purchased certain assets of Goshen Cushion, Inc. in 1995 — eight years after 1987. (*Id.*, ¶¶ 90-91). Plaintiffs further speculate that Dygert Seating, Inc. transported this allegedly TCE-based adhesive to its Elkhart manufacturing sites, where it was also allegedly used. (*Id.* at ¶ 91) Even more remotely, Plaintiffs then speculate that the Dygert Seating Division of Flexsteel *also* used TCE-based adhesive when Flexsteel finally purchased selected assets of the bankrupt entity Dygert Seating, Inc. in 1997 — now ten years and two asset purchases since 1987. (*Id.*). Finally, Plaintiffs speculate, “on information and belief,” that this usage somehow also involved releasing TCE into the ground. (*Id.* at ¶72). These allegations are not true.

Plaintiffs don’t provide the 1987 Material Safety Data Sheet (“MSDS”) for the adhesive they referenced in ¶ 88 of their *Amended Complaint* for the Court to verify the accuracy of Plaintiffs’ representations. Thus, and as illustrated above, they fail to disclose that the adhesive MSDS they reference in ¶ 88 is attached to a letter from 1987 — eight years before David Dygert purchased any assets of Goshen Cushion, Inc. (*FE 14*). Plaintiffs also fail to disclose that the MSDS sheet relates to the operations of Goshen Cushion, Inc. at 1010 Eisenhower Drive, and not to the operations of Dygert Seating, Inc. at that manufacturing location (*Id.*). In other words, Plaintiffs’ “starting point,” — that an adhesive used by the bankrupt entity Dygert Seating, Inc. at 1010 Eisenhower Drive in Goshen contained TCE — is not true on many levels.

All of this information concerning the MSDS sheet, the company that used it, and the date it was used, is contained within records publicly available from the ECHD. Plaintiffs cite these records in their *Amended Complaint*, but fail to attach them for the Court’s review. The misleading citation of these records by Plaintiffs was improper.

These misleading suggestions of TCE usage by the bankrupt entity Dygert Seating, Inc. are followed by a request that the Court believe that David Dygert lied upon signing a July 23,

1997 Notification of Hazardous Waste Removal which stated that the subject waste was removed from 1010 Eisenhower Drive in Goshen. (*Amended Complaint*, ¶¶ 67-117).

The July 23, 1997 Notification is publicly available from IDEM. And, this Notification states that waste was manifested from 1010 Eisenhower Drive in Goshen. (*FE 6* at *Exhibit J*). But Plaintiffs ask this Court to believe that Dave Dygert lied, and ask that the Court instead believe Plaintiffs' false allegations, "on information and belief," that these chemicals were instead transported to Elkhart and then used and disposed of by Dygert Seating, Inc. and later the former Dygert Seating Division of Flexsteel under the EPA Identification Number for the Goshen manufacturing site of Dygert Seating, Inc. (*Amended Complaint*, ¶¶ 86-141).

Finally, Plaintiffs ask this Court to disregard public records from IDEM and from the Bankruptcy Court documenting the proper disposal of waste by the bankrupt entity, Dygert Seating, Inc., from 1010 Eisenhower Drive in Goshen. Plaintiffs ask this Court to ignore the contents of these public records, even though the correspondence of attorneys from a law firm representing Plaintiffs here plainly demonstrate that several attorneys from the law firm representing Plaintiffs knew of, and actively participated in, accomplishing the proper removal and disposal of the waste at issue in Plaintiffs' *Amended Complaint* – and represented to a court that it in fact had occurred.

In summary, Plaintiffs filed their *Amended Complaint* "on information and belief" accusing Flexsteel of multiple, serious criminal acts which Plaintiffs knew or should have known had no basis in fact. Moreover, Plaintiffs have threatened a lawsuit against Flexsteel under the Resource Conservation & Recovery Act ("RCRA"), affirmatively representing to both IDEM and the EPA that the former Dygert Seating Division of Flexsteel used and improperly disposed of TCE – which Plaintiffs knew was incorrect based on public records and the correspondence of

attorneys from the law firm representing Plaintiffs here. (*Letter from T. Barnard*, attached hereto as *FE 15*).

These allegations were aggressively and outrageously pled against Flexsteel without a good faith basis. These allegations were also without factual support. Flexsteel is entitled to summary judgment here.

II. SUMMARY JUDGMENT STANDARD

Under IND. TRIAL RULE 56(C), summary judgment “shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” The party opposing summary judgment may not rest upon the mere allegations of its pleading, but must set forth *specific facts* establishing a genuine issue for trial. *Van Eaton v. Fink*, 697 N.E.2d 490, 493 (Ind. Ct. App. 1998). Otherwise, summary judgment must be granted. T.R. 56(C).

Flexsteel is entitled to summary judgment here because (1) the Dygert Seating Division of Flexsteel never used TCE or TCA in its manufacturing processes, and (2) no TCE or TCA was ever “leaked, spilled, or dumped” by that Division, as Plaintiffs incorrectly plead “on information and belief.” Accordingly, there are no genuine issues of material fact, and Flexsteel is entitled to summary judgment on Plaintiffs’ claims, as a matter of law. T.R. 56(C).

III. FLEXSTEEL IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS’ FRIVOLOUS CLAIMS

Plaintiffs’ claims can be divided into three categories: (1) property damage claims pled under theories of trespass, nuisance, and negligence; (2) personal injury claims pled under theories of negligence and negligent infliction of emotional distress, and (3) Plaintiffs’ claim for attorney fees and costs under the Indiana Environmental Legal Action statute, I.C. §§13-30-9-2

and 13-30-9-3.³ (*Amended Complaint*, at ¶¶ 252-276).

Although the elements of Plaintiffs' claims are different, each of these claims has at least two common issues of fact which Plaintiffs must prove (among other factors) to establish liability on all of these claims: that the former Dygert Seating Division of Flexsteel (1) used TCE and TCA, or products containing those chemicals, in its manufacturing processes; and (2) released TCE and/or TCA, or products containing those chemicals, into the soil or groundwater at the Marina Drive or Cooper Drive manufacturing sites. Though proof of these allegations is not dispositive of Flexsteel's liability for any one of Plaintiffs' claims, proof of these elements is a *necessary component* of liability for all of Plaintiffs' claims.

Plaintiffs' allegations concerning TCE and TCA usage by the former Dygert Seating Division of Flexsteel — including Plaintiffs' allegations that TCE and/or TCA was secretly moved from Goshen to Elkhart — are simply incorrect and without any factual basis. And, Plaintiffs' allegations that the former Dygert Seating Division of Flexsteel “spilled, leaked, or dumped” these chemicals at the Cooper Drive and Marina Drive manufacturing sites in Elkhart is also wrong. These allegations, all of which are pled in Plaintiffs' *Amended Complaint* “on information and belief,” are false, and Plaintiffs knew them to be false.

Because Flexsteel neither used TCE or TCA in its manufacturing processes, nor released TCE or TCA, or any products containing TCE or TCA, at its former Dygert Seating Division, there are no genuine issues of material fact and Flexsteel is entitled to summary judgment on Plaintiffs' frivolous, unsupported claims as a matter of law.

³ Though Plaintiffs also allege “Punitive Damages” as a separate claim, punitive damages are just a remedy, and not a separate cause of action under Indiana law. *See Allstate Ins. Co. v. Axsom*, 696 N.E.2d 482, 485 (Ind. Ct. App. 1998). Accordingly, the Court should grant summary judgment on that improperly pled “claim” as a matter of law.

A. PLAINTIFFS' CLAIMS FOR TRESPASS FAIL.

In a toxic tort case, “liability” for trespass requires proof, first, that the plaintiff “possessed the land when the alleged trespass occurred. Second, the plaintiff must demonstrate that the trespassing defendant entered the land without a legal right to do so.” *KB Home Indiana, Inc. v. Rockville TBD Corp.*, 928 N.E.2d 297, 308-09 (Ind. Ct. App. 2010).

Without waiving any argument with respect to the first element of trespass or any other fact necessary as to the second element: Plaintiffs’ claims for trespass fail because the former Dygert Seating Division of Flexsteel did not use TCA, or any products containing TCA, at any time – let alone “leak, spill, or dump” any such products into the soil or groundwater. (*FE 7* at RFA 4, 7; *FE 8* at Interrogatories 10, 27).

Likewise, the former Dygert Seating Division of Flexsteel did not use TCE, or any product containing TCE in its manufacturing processes, at any time – let alone “leak, spill, or dump” any such products into the soil or groundwater. (*FE 7*, at RFA 4, 7, 9-10; *FE 8* at Rogs. 10, 25). Indeed, the only products used by the former Dygert Seating Division of Flexsteel which may have contained TCE were aerosol spray products sized for individual/household consumer use, and used in maintenance activities. (*Id.*)

It is unreasonable to infer that groundwater contamination such as identified at the Lane Street Groundwater Contamination Site could be caused, in whole or part, by use of an aerosol spray can which any Plaintiff could have purchased from the hardware store for use around the home. *Accord Hampton v. Moistner*, 654 N.E.2d 1191, 1194 (Ind. Ct. App. 1995) (stating that evidence “which is uncertain or speculative or which raises merely a conjecture or possibility” is not a possible basis for summary judgment).

Flexsteel is entitled to summary judgment on Plaintiffs’ claims of trespass here because Flexsteel did not use TCA or TCE in its manufacturing processes, or cause any TCA or TCE to

“enter” Plaintiffs’ current or former properties. *See KB Home*, 928 N.E.2d at 308-09.

B. PLAINTIFFS’ CLAIMS FOR NUISANCE FAIL.

Under Indiana law, a nuisance is “whatever is (1) injurious to health; (2) indecent; (3) offensive to the senses; or (4) an obstruction to the free use of property so as essentially to interfere with the comfortable enjoyment of life or property is a nuisance, and the subject of an action.” *See Neil v. Cure*, 937 N.E.2d 1227, 1231 (Ind. Ct. App. 2010) (quoting I.C. § 32-30-6-6). “It is elementary that no one can be held liable for a nuisance, unless the injurious consequences complained of are the natural and proximate result of his acts, or his failure to perform some duty.” *Id.* (citation omitted).

As with Plaintiffs’ baseless claims that Flexsteel trespassed on their current or former properties, there is no evidence, whatsoever, that the Dygert Seating Division of Flexsteel engaged in “acts” which led to contamination on Plaintiffs’ current or former properties. This Division *did not even use* TCE or TCA in its manufacturing processes. Every single one of Plaintiffs’ allegations in that regard is pled “on information and belief” – allegations which Flexsteel has demonstrated are false, and which Plaintiffs knew to be false at the time they filed their *Amended Complaint*.

Moreover, Plaintiffs’ cause of action sounds in negligence, not nuisance. *See KB Home*, 928 N.E.2d at 306. In Indiana, “a nuisance is an activity that generates injury or inconvenience to others” *KB Home*, 928 N.E.2d at 306 (quoting *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1231 (Ind. 2003)) (emphasis added).

According to the *KB Home* Court, “a nuisance claim generally contemplates an action that is designed to cease or lessen the defendant’s continued offensive behavior.” *Id.* at 307. Therefore, summary judgment is appropriate on a nuisance claim where the plaintiff alleges that his or her property was injured by a past release of contaminants by a company that has not been

in operation at the disputed site for many years. *Id.* at 308. In such circumstances, “the damage has already been done, and [Plaintiff’s] cause of action against [Defendant] sounds in negligence,” not nuisance. *Id.*

Because Flexsteel’s alleged “behavior” – the purported release of TCE and TCA – stopped on January 2, 2002 even under Plaintiffs’ false theories of chemical usage and disposal, there is no “activity” to enjoin under Indiana’s nuisance statute, I.C. § 32-30-6-8. *Id.* For this reason as well, Flexsteel is entitled to summary judgment on Plaintiffs’ “nuisance” claims.

C. PLAINTIFFS’ CLAIMS UNDER THE ELA FAIL.

A Plaintiff may only bring a cause of action against a party who “caused or contributed” to the contamination under the ELA. *See* I.C. § 13-30-9-2. Even then, the claim is limited to the reasonable costs of removal or remediation, as those terms are defined within I.C. § 13-30 *et seq.* Any award of attorney fees is entirely within the discretion of the Court. *See* I.C. 13-30-9-3.

As a practical matter, asserting a claim for attorney fees and costs for alleged “remediation” and “removal” efforts under the ELA is specious, when Plaintiffs have known about the contamination for nearly four years and do not allege to have taken any steps towards remediation or removal whatsoever during that time period – during which time the EPA already (1) placed all Plaintiffs’ residences on City Water three years ago, (2) placed the Lane Street Groundwater Contamination Site (which encompasses their current and former residences) on the National Priorities List two years ago, and (3) is currently conducting its own investigation and risk assessment activities. (*FE* 1).

Regardless, Plaintiffs’ claims under this statute face the same problem as Plaintiffs’ other property-related claims: Flexsteel did not “cause or contribute” to the TCE and TCA in the groundwater underneath Plaintiffs’ residences.

As stated above, the former Dygert Seating Division of Flexsteel did not use TCE or

TCA in its manufacturing processes. The former Dygert Seating Division of Flexsteel did not “leak, spill, or dump” any TCE or TCA, either. Plaintiffs’ allegations that the Dygert Seating Division of Flexsteel used TCE and TCA in its manufacturing processes – a use that the ECHD did not identify in *any one* of its multiple inspections of the Elkhart, Indiana manufacturing sites, and then improperly disposed of these chemicals under the EPA Identification Number for a different manufacturing site – is outrageous and not true. Plaintiffs had no good faith basis for making these allegations, which are not factual. Flexsteel is entitled to summary judgment on Plaintiffs’ ELA claims.

D. PLAINTIFFS’ CLAIMS FOR NEGLIGENCE FAIL.

Negligence requires Plaintiffs to prove duty, breach, causation, and damages. *See Neal* 937 N.E.2d at 1236-37. Here, Plaintiffs allege that, as a result of the alleged negligence of the Dygert Seating Division of Flexsteel, Plaintiffs have been exposed to TCE and TCA, which has proximately caused damage to their DNA and an increased risk of cancer. (*Amended Complaint*, at pp. 2-3).

Assuming Flexsteel had some duty to Plaintiffs with respect to chemical usage and/or disposal – which Flexsteel disputes – Plaintiffs still cannot prove that any negligence by Flexsteel as a result of chemical usage or disposal proximately caused Plaintiffs any injury because (1) the Dygert Seating Division of Flexsteel did not use or store TCE or TCA in the course of its manufacturing operations; and (2) the Dygert Seating Division of Flexsteel did not release any TCE or TCA, as set forth above. There is simply no basis for Plaintiffs’ contrary allegations, which are pled on “information and belief.”

Flexsteel is entitled to summary judgment on Plaintiffs’ claim that Flexsteel’s negligence caused them to be exposed to TCE and TCA because these unsupported allegations are not factual. *See Van Eaton*, 697 N.E.2d at 493.

E. PLAINTIFFS' CLAIMS FOR NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS FAIL.

Like straight “negligence” claims, negligent infliction of emotional distress (“NIED”) also requires proof of negligence on the part of the defendant. *See Schuamber v. Henderson*, 579 N.E.2d 452, 456 (Ind. 1991) (requiring, for NIED, that the plaintiff “sustains a direct impact by the negligence of another” among other factors). For the same reasons that Plaintiffs’ claims for negligence fail, Plaintiffs’ claims for NIED fail. Again, Flexsteel did not “leak, spill, or dump” TCE or TCA – or even use these chemicals in its manufacturing processes at the former Dygert Seating Division of Flexsteel. Flexsteel is entitled to summary judgment on Plaintiffs’ claims for NIED.

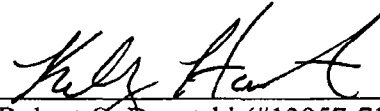
IV. CONCLUSION

Plaintiffs had no good faith basis for filing their *Amended Complaint*, in which each and every substantive allegation is pled “on information and belief.” Plaintiffs’ speculative allegations of chemical usage and disposal are directly contrary to public records, including records of the Bankruptcy Court, the Indiana Department of Environmental Management, and the Elkhart County Health Department. They are also directly contrary to records drafted by attorneys from the law firm representing Plaintiffs here.

The undisputed facts shows that the Dygert Seating Division of Flexsteel did not use TCE or TCA in its manufacturing processes, did not improperly dispose of those chemicals at any time, and did not “release” TCE or TCA into the ground. Flexsteel is entitled to summary judgment on Plaintiffs’ frivolous claims, which are based on nothing more than contrary allegations pled “on information and belief.” Plaintiffs’ spurious allegations are not a sufficient basis for preserving their claims when the only admissible evidence must inexorably lead the trier-of-fact to conclude that no TCE or TCA were used or disposed at the Elkhart sites.

THEREFORE, Defendant Flexsteel Industries, Inc. ("Flexsteel"), respectfully moves for an order granting summary judgment in favor of Flexsteel on Plaintiffs' claims, and for all other appropriate relief.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Kelly Hartzler", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing document has been served upon the following, by depositing the same in the United States mail, postage prepaid, this 13th day of June, 2011.

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